

IN THE COURT OF APPEALS OF TENNESSEE
AT NASHVILLE
September 4, 2008 Session

HEATHER LYNN HARRIS v. TROY DANIEL HARRIS

**An Appeal from the Circuit Court for Davidson County
No. 04D531 Muriel Robinson, Judge**

No. M2008-00601-COA-R3-CV - Filed February 18, 2009

This appeal involves a post-divorce petition to modify transitional alimony. In the divorce decree, the husband was ordered to pay the wife transitional alimony for four years. The wife remarried during the four-year period. The husband petitioned the trial court to modify or terminate the transitional alimony based on the wife's remarriage and the new husband's financial contributions to the wife's household. After a hearing, the trial court reduced the husband's transitional alimony payments and shortened the duration of the alimony by one year. The husband now appeals, arguing that the trial court should have terminated his alimony obligation entirely, rather than simply reducing it. We affirm, finding that the trial court's decision was not an abuse of its discretion.

**Tenn. R. App. P. 3 Appeal as of Right; Judgment of the Circuit Court is Affirmed
and Remanded**

HOLLY M. KIRBY, J., delivered the opinion of the Court, in which ALAN E. HIGHERS, P.J., W.S., and J. STEVEN STAFFORD, J., joined.

Thomas J. Dement, II, Nashville, Tennessee, for the appellant, Troy Daniel Harris.

James L. Collier, Nashville, Tennessee, for appellee, Heather Lynn Harris.

OPINION

Plaintiff/Appellee Heather Lynn Harris ("Wife") and Defendant/Appellant Troy Daniel Harris ("Husband") were divorced by final decree on March 7, 2006. In the decree, the parties were awarded joint custody of their only child, born in 2000.¹ The trial court ordered Husband to pay Wife transitional alimony of \$4,000 per month for a period of four years, from February 1, 2006 through January 1, 2010, with the proviso that Husband could petition the trial court to review the award if Wife's annual earnings increased to more than \$150,000.

¹This appeal does not involve issues related to the parenting time or support of the minor child.

On September 4, 2006, Wife married Todd Allen Waterhouse (“Waterhouse”). They began living together immediately after the marriage.

On October 12, 2006, Husband filed a petition to modify or terminate his alimony obligation based on Wife’s remarriage. The petition cited Tennessee Code Annotated § 36-5-121(g)(2)(C), which sets out the circumstances under which transitional alimony may be modified based on the alimony recipient’s cohabitation with a third person. Husband’s petition did not request that the alimony modification be made retroactive to the date of the remarriage. On March 22, 2007, after a hearing, the trial court dismissed Husband’s petition without prejudice for lack of sufficient evidence.

The next day, on March 23, 2007, Husband refiled his petition to modify or terminate the transitional alimony award. The refiled petition requested that any modification be made retroactive to the date of Wife’s remarriage. The hearing on Husband’s motion was set for February 14, 2008.

At the hearing, the trial court heard testimony from Husband, who is a physician. Husband testified that he earned over \$29,000 in gross wages per month. He does not dispute his ability to pay alimony.

The trial court also heard testimony from Wife, who is a psychiatrist. At the time of the hearing, Wife was not employed. She testified that, the week following the hearing, she was scheduled to begin a new job earning \$95,000 per year. This rate of pay was about \$20,000 per year more than her previous job. According to the income/expense statement entered into evidence, at Wife’s previous level of earnings, her expenses exceeded her income by about \$2,958 per month. In her new position, this deficit would be reduced to about \$1,300 per month. In addition, Wife testified that, once she had been in her new job for nine months, she would become eligible for performance incentives.

Wife’s new husband, Waterhouse, earns about \$75,000 per year as a managing partner of Rod’s Tire Care. He has four daughters from a previous marriage, who live with him and Wife about 50% of the time. Thus, when all of both parties’ children are at Wife’s home with Waterhouse, there are seven family members living in the home together. In order to keep their financial records accurate for legal proceedings, Waterhouse and Wife keep separate checking accounts. Wife pays the parties’ rent, utilities, and other household expenses. Waterhouse pays for expenses related to his four children, including monthly child support, lunches, and music lessons. The parties share the expenses for groceries, automobile and vacations.

After the hearing, the trial court entered an order modifying Husband’s transitional alimony obligation. The monthly payment was reduced from \$4,000 to \$1,500 beginning on March 1, 2008, and the ending date for the alimony obligation was moved from January 1, 2010 to approximately

a year earlier, on January 31, 2009. On February 25, 2008, the trial court entered an order consistent with its oral ruling. Husband now appeals.²

Under the applicable statute, an award of transitional alimony is nonmodifiable unless (1) the parties agree otherwise, and such agreement is incorporated in the trial court's order; (2) the court otherwise provides in its order making the award; or (3) the alimony recipient begins living with a third person. T.C.A. § 36-5-121(g)(2) (2005). When the alimony recipient begins to cohabit with a third person, a rebuttable presumption is raised that:

(i) The third person is contributing to the support of the alimony recipient and the alimony recipient does not need the amount of support previously awarded, and the court should suspend all or part of the alimony obligation of the former spouse; or

(ii) The third person is receiving support from the alimony recipient and the alimony recipient does not need the amount of alimony previously awarded and the court should suspend all or part of the alimony obligation of the former spouse.

T.C.A. § 36-5-121(g)(2)(C). Relying on this statutory presumption, Husband argues that the trial court erred in declining to terminate his alimony obligation to Wife altogether, rather than merely modifying it. He claims that Wife's remarriage created a presumption that she no longer needed support, particularly in light of Waterhouse's financial contributions to Wife's household. He points out that, after the divorce, Wife continued owning vehicles, and that she and Waterhouse purchased a horse, purchased a new home, and went on family vacations. Thus, Husband contends, the evidence of Wife's lifestyle submitted at the hearing was insufficient to overcome the statutory presumption the Wife was no longer in need of alimony, and his alimony obligation should have been terminated. In the alternative, Husband argues, the trial court erred in failing to make the alimony modification retroactive back to the date on which Wife began living with Waterhouse.³

In response, Wife points out that, when she and Husband were married, they enjoyed a combined monthly income of over \$30,000. Thus, she notes, it is not unreasonable to expect that she would have purchased a vehicle, a horse, and other items. Furthermore, the expense of continuing to own a vehicle or a horse, she asserts, is modest, and the home she purchased with Waterhouse is likewise modest. She contends that the trial court, with all of this evidence before it, did not abuse its discretion in declining to end Husband's alimony obligation altogether.

Our review of a trial court's decision regarding the modification of spousal support is limited: Because modification of a spousal support award is factually driven, a trial court's

²Wife raises no issue on appeal.

³Husband did not argue that the modification should date back to the date that he filed his petition. *See Howell v. Howell*, No. M2005-01262-COA-R3-CV, 2006 WL 1763660, *4 (Tenn. Ct. App. June 28, 2006) (discussing when it is appropriate to make an alimony reduction retroactive to the date of the filing of the petition).

decision to modify its award is given wide latitude within the trial court's range of discretion. *See Watters v. Watters*, 22 S.W.3d 817, 821 (Tenn. Ct. App. 1999). A trial court abuses its discretion only when it “ ‘applie[s] an incorrect legal standard, or reache[s] a decision which is against logic or reasoning that cause[s] an injustice to the party complaining.’ ” *Eldridge v. Eldridge*, 42 S.W.3d 82, 85 (Tenn. 2001) (quoting *State v. Shirley*, 6 S.W.3d 243, 247 (Tenn. 1999)). We shall presume the correctness of the trial court's factual findings so long as the evidence does not preponderate against them. *See* Tenn. R. App. P. 13(d); *Crabtree v. Crabtree*, 16 S.W.3d 356, 360 (Tenn. 2000). However, we review the trial court's conclusions of law under a *de novo* standard with no presumption of correctness. *See Burlew v. Burlew*, 40 S.W.3d 465, 470 (Tenn. 2001).

Perry v. Perry, 114 S.W.3d 465, 466-67 (Tenn. 2003).

At the outset, we observe that, in this case, the only basis for modification of the award of Husband's transitional alimony obligation is Wife's remarriage and her new husband's contribution to her financial support. As noted by Husband, the statute places on Wife the burden to come forward with evidence to rebut the statutory presumption raised by her remarriage. However, on appeal, the issue becomes whether the trial court abused its discretion in deciding to reduce, rather than terminate, Husband's alimony obligation. At the conclusion of the hearing below, the trial court specifically found that Wife benefitted from the income that Waterhouse brought into the household, stating that Waterhouse “does have an amount to contribute to [Wife's] expenses.” The trial court noted, however, that Waterhouse's resources were also used to support his four children. Based on these findings, among others, the trial court reduced Husband's alimony obligation by \$2,500 per month and terminated it a year early.⁴

Thus, under section 36-5-121(g)(2)(C), the trial court exercised its discretion to “suspend . . . part” of Husband's alimony obligation based on Waterhouse's contributions to Wife's support.⁵ As noted above, the trial court has wide latitude in deciding the degree to which Husband's transitional alimony obligation should be suspended. Under the circumstances presented in this case, we find no abuse of discretion in the trial court's decision to reduce Husband's alimony obligation, rather than terminating the obligation altogether.

⁴The effective date of the modification coincided with the date on which Wife anticipated that she would qualify for additional pay in the form of performance incentives. We note that the statute does not list an increase in the obligee spouse's earnings as a basis for modification of transitional alimony; however, it states that the alimony award can be modified later if the trial court so provides in its order. Here, the divorce decree specifically stated that the transitional alimony award could be reconsidered if Wife's earnings increased to \$150,000 per year or more.

⁵At the hearing, Wife did not dispute that Waterhouse contributed to her support and that, as a result, her need for the transitional alimony was not as great as when the alimony was initially ordered. She asked the trial court to reduce, rather than terminate, her alimony award.

In the alternative, Husband argues that the trial court erred in failing to make the modification of his alimony obligation retroactive to the date on which Wife began living with her new husband. The trial court was not required to make the modification of its award retroactive to the time of Wife's remarriage, and we find no abuse of its discretion in its decision not to do so. Section 36-5-121(g) provides that a court may provide in its decree that transitional alimony will automatically terminate upon the remarriage of the payee, or that the parties may agree that such alimony will terminate upon remarriage, so long as such an agreement is incorporated into the decree. T.C.A. § 36-5-121(g). In this case, no such provision was included in the divorce decree. *See Miller v. Davidson*, No. M2006-00099-COA-R3-CV, 2006 WL 2852396, at *3 n.6 (Tenn. Ct. App. Oct. 5, 2006) (recognizing that transitional alimony does not automatically terminate upon the payee's remarriage, but that the parties could have entered into an agreement otherwise). Under all of these circumstances, we find no abuse of discretion in the trial court's refusal to make its award retroactive to the date Wife married and began living with Waterhouse.

Wife requests that she be awarded her attorney's fees in defending this appeal. An award of appellate attorney's fees is a matter within this Court's sound discretion. *Archer v. Archer*, 907 S.W.2d 412, 419 (Tenn. Ct. App. 1995). In considering a request for attorney's fees on appeal, we consider the requesting party's ability to pay such fees, the requesting party's success on appeal, whether the appeal was taken in good faith, and any other equitable factors relevant in a given case. *Darvarmanesh v. Gharacholou*, No. M2004-00262-COA-R3-CV, 2005 WL 1684050, at *16 (Tenn. Ct. App. July 19, 2005). Considering all of the relevant factors in this case, we grant reasonable appellate attorney's fees to Wife. The cause must be remanded to the trial court to determine the appropriate amount of attorney's fees for this appeal.

The decision of the trial court is affirmed, and the cause is remanded for further proceedings consistent with this Opinion. Costs on appeal shall be taxed to the Appellant Troy Daniel Harris and his surety, for which execution may issue, if necessary.

HOLLY M. KIRBY, JUDGE